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# Supreme Court of the United States

October Term 1968

No. 490

JAMES BOYD, BERNARD HUGHES, CECIL RALPH HENDRIX, and CHARTER TAYLOR, JR.,

*Plaintiffs-Appellants,*

v.

RAMSEY CLARK, as Attorney General of the United States, LEWIS B. HERSHEY, as Director of Selective Service of the United States, PAUL AKST, as Director of Selective Service of the City of New York, SELECTIVE SERVICE BOARD No. 44 of the City of New York, and SELECTIVE SERVICE BOARD No. 2 of the City of New York,

*Defendants-Appellees.*

On Appeal From The United States District Court
For The Southern District of New York

## JURISDICTIONAL STATEMENT

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*September 4, 1968*

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SUPREME COURT OF THE UNITED STATES

October Term, 1968

No.

JAMES BOYD, BERNARD HUGHES, CECIL RALPH HENDRIX, and CHARTER TAYLOR, JR.,

*Plaintiffs-Appellants,*

v.

RAMSEY CLARK, as Attorney General of the United States, LEWIS B. HERSHEY, as Director of Selective Service of the United States, PAUL AKST, as Director of Selective Service of the City of New York, SELECTIVE SERVICE BOARD No. 44 of the City of New York, and SELECTIVE SERVICE BOARD No. 2 of the City of New York,

*Defendants-Appellees.*

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On Appeal From the United States District Court For The Southern District of New York

## JURISDICTIONAL STATEMENT

James Boyd, Bernard Hughes, Cecil Ralph Hendrix and Charter Taylor, Jr., having appealed from a decision of a three-judge statutory court of the Southern District of New York dismissing their complaint, submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

### Opinions Below

The opinion of the three-judge statutory court, as yet unreported, is appended hereto, *infra*, at pp. 1a-17a.

## Jurisdiction

Plaintiffs, four Selective Service registrants, filed a complaint[1] in the Southern District of New York alleging that the student deferment provisions of the Military Training and Service Act of 1967 (hereinafter called the "Act") and the regulations enacted thereunder were unconstitutional in that they discriminated against persons, such as plaintiffs, who were economically unable to attend college. The complaint also alleged that the classification of registrants into two groups—students and non-students—was an arbitrary and discriminatory classification bearing no reasonable relationship to the purpose of the Act and hence was unconstitutional.

Since the complaint sought to enjoin enforcement and execution of an Act of Congress, plaintiffs requested the convening of a three-judge statutory court. The government moved to dismiss the complaint. The matter came on before District Judge David N. Edelstein who heard the government's motion to dismiss, and referred the entire matter to a three-judge court.

On June 26, 1968 the court, Judge Edelstein dissenting, dismissed the complaint. A judgment dismissing the complaint was entered on July 1, 1968. A copy of said judgment is appended hereto, *infra*, at pp. 18a-19a. On July 10, 1968, a notice of appeal to the United States Supreme Court from the decision of the court was filed in the Southern District of New York.

Jurisdiction of this appeal is conferred by 28 U.S.C. §1253. The following cases sustain the Court's jurisdiction: *Zemel* v. *Rusk*, 381 U.S. 1; *Aptheker* v. *Secretary of State*, 378 U.S. 500.

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[1] An original complaint was filed on June 28, 1967. Due to the passage of the Military Selective Service Act of 1967, an amended complaint was filed on July 31, 1967. All references to the complaint herein are to the amended complaint.

## Statutes Involved

The principal sections involved are §§6(h)(1) and 10(b)(3)[2] of the Military Selective Service Act (50 App. U.S.C. §456(h)(1) and 50 App. U.S.C. §460(b)(3), respectively). These sections read as follows:

*Military Selective Service Act*

§6 Deferments and Exemptions from Training and Service

* * *

(h)(1) Except as otherwise provided in this paragraph, the President shall, under such rules and regulations as he may prescribe, provide for the deferment from training and service in the Armed Forces of persons satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment. A deferment granted to any person under authority of the preceding sentence shall continue until such person completes the requirements for his baccalaureate degree, fails to pursue satisfactorily a full-time course of instruction, or attains the twenty-fourth anniversary of the date of his birth, whichever first occurs. Student deferments provided for under this paragraph may be substantially restricted or terminated by the President only upon a finding by him that the needs of the Armed Forces require such action. No person who has received a student deferment under the provisions of this paragraph shall thereafter be granted a deferment under this subsection, nor shall any such person be granted a deferment under sub-

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[2] The Military Selective Service Act was amended in 1967. Part of the 1967 Amendment was the addition to Sec. 10(b)(3) of language relating to judicial review.

section (1) of this section if he has been awarded a baccalaureate degree, except for extreme hardship to dependents (under regulations governing hardship deferments), or for graduate study, occupation or employment necessary to the maintenance of the national health, safety, or interest. Any person who is in a deferred status under the provisions of subsection (1) of this section after attaining the nineteenth anniversary of the date of his birth, or who requests and is granted a student deferment under this paragraph, shall, upon the termination of such deferred status or deferment, and if qualified, be liable for induction as a registrant within his prime age group irrespective of his actual age, unless he is otherwise deferred under one of the exceptions specified in the preceding sentence. As used in this subsection, the term "prime age group" means the age group which has been designated by the President as the age group from which selections for induction into the Armed Forces are first to be made after delinquents and volunteers.

§10 Selective Service System

* * *

(b)(3) . . . No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant.

## Questions Presented

(1) Does §10(b)(3) of the Military Selective Service Act, 50 App. U.S.C. §460(b)(3), bar a court, prior to a registrant's induction, from entertaining a suit challenging the constitutionality of a provision of that Act?

(2) Is §10(b)(3) unconstitutional if it is interpreted as barring a court from entertaining the constitutional claims of a registrant prior to his induction?

(3) Must a plaintiff demonstrate that he will suffer a monetary loss of $10,000.00 in order to meet the jurisdictional requirement of 28 U.S.C. §1331 that the "matter in controversy" exceeds the sum or value of $10,000.00.

## Statement of the Case

Plaintiffs are four Selective Service registrants who, at the time this action commenced, were classified I-A by their respective local Selective Service boards.[3] They were all persons of limited financial means who were economically unable to attend college.

§6(h)(1) of the Act provides that a registrant who is pursuing a full-time course of instruction at a college shall receive a II-S classification until he completes the requirements for his baccalaureate degree or reaches the age of 24, whichever first occurs. The complaint alleged (Para. 10) that the effect of §6(h)(1) and the Selective Service regulations enacted thereunder is to grant college students II-S classifications while registrants such as plaintiffs, who are economically unable to go to college, are classified I-A. Since under Selective Service Regulations

[3] Prior to the decision of the court below, plaintiff Hendrix had been re-classified II-A and plaintiff Hughes had been re-classified II-S by their respective local boards. Plaintiffs Boyd and Taylor are still classified I-A.

local draft boards are required to fill draft quotas from those classified I-A, the student deferment provisions increase the likelihood that registrants such as plaintiffs will be inducted into the Armed Forces while registrants attending college postpone their induction for several years and at times escape military service altogether by acquiring other deferments.

The complaint further alleged (Para. 16) that the student deferment provisions contained in the Act and the regulations enacted thereunder are unconstitutional and violate the due process clause of the Fifth Amendment in that they discriminate against registrants such as plaintiffs who, through lack of financial means, are unable to attend college and hence are not able to obtain a II-S classification. The complaint further alleged (Para. 16) that the classification of registrants into two groups, i.e., students and non-students, is an arbitrary and discriminatory classification bearing no reasonable relationship to the purpose of the Act and hence is unconstitutional. The complaint also alleged (Para. 5) that the matter in controversy exceeded, exclusive of interests and costs, the sum of $10,000.00.

Plaintiffs moved for the convening of a three-judge statutory court and the defendants moved to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief could be granted. No challenge was made as to the allegation of jurisdictional amount contained in the complaint. The matter came on before District Judge David N. Edelstein who referred the entire matter to a three-judge court.

The three-judge court, at the argument, raised, *sua sponte*, the question of whether the jurisdictional amount requirement had been satisfied. On June 26, 1968, the court, Judge Edelstein dissenting, dismissed the complaint on the ground that the plaintiffs' claims were prematurely made and could only be

raised in either a *habeas corpus* proceeding after a registrant had submitted to induction, or as a defense to a criminal prosecution following a refusal to submit to induction. The court also held that the plaintiffs had failed to prove that the amount in controversy exceeded the sum or value of $10,000.00.

A judgment dismissing the complaint was entered on July 1, 1968 and an appeal to the United States Supreme Court was filed in the District Court on July 10, 1968.

Plaintiff Taylor had previously received an order to report for induction on August 4, 1968. Following the entry of the judgment, the court, upon plaintiffs' motion, issued an order enjoining the defendants from inducting either plaintiffs Boyd or Taylor into the Armed Forces pending the final disposition of the case by this Court.[4]

## The Questions Are Substantial

This appeal raises fundamental questions concerning the necessity, and applicability, of judicial review in situations where the constitutionality of a statute is attacked prior to a registrant's induction into the Army. The importance of these questions extends beyond the Selective Service field, however, for the decision of the court below ignores a long series of Supreme Court cases, commencing with *Ex parte Young*, 209 U.S. 123, which hold that a person need not risk severe criminal penalties in order to assert his constitutional claims.

The appeal also raises a fundamental question concerning the meaning of the $10,000.00 jurisdictional amount requirement contained in 28 U.S.C. §1331. The various federal courts, including the Supreme Court, which have considered this question have reached differing conclusions. Compare *Barry* v. *Mercein*,

[4] The court's order did not include plaintiffs Hendrix and Hughes since they were not classified I-A at the time the court rendered its decision.

46 U.S. (5 How.) 103 and *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied* 379 U.S. 1001 with *Wiley* v. *Sinkler*, 179 U.S. 58 and *Brickhouse* v. *Brooks*, 165 Fed. 534 (C.C.E.D. Va. 1908).

(1) The court below relied both upon §10(b)(3) and prior Selective Service cases for its holding that the plaintiffs' claims were prematurely made and could only be raised in a post-induction *habeas corpus* proceeding or as a defense to a criminal prosecution for failing to submit to induction. The court's decision misconstrued the meaning of §10(b)(3) and the holding of prior cases.

It must be emphasized at the outset that this is not the usual Selective Service case where a registrant is disputing the validity of his individual classification, for the plaintiffs admit that they are properly classified I-A, assuming the validity of the Act. They argue instead that the student deferment provisions provided for in the Act and the regulations relating thereto are unconstitutional.

§10(b)(3) was not intended to foreclose this type of pre-induction suit. The section on its face does not have any applicability to this action for it talks in terms of foreclosing judicial review, prior to induction, of the "classification or processing of any registrant." Plaintiffs, however, do not seek review of their classification or processing.

§10(b)(3) clearly could not serve as a definitive statement of the sole method of court review in matters affecting the Selective Service System. The section does not even provide for a review of a registrant's classification by means of post-induction *habeas corpus*. The court below acknowledged, *infra*, at p. 3a, that Congress did not intend to eliminate this method of review.

The constant references in the legislative history of §10(b)(3) to "exhaustion of administrative remedies" and "basis in fact for the classification" also clearly indicate that Congress was concerned with the typical case of a registrant who was seeking pre-induction relief by claiming that his local Selective Service board had improperly classified him. See H.R. Rep. No. 267, 90th Congress, 1st Sess., pp. 30-31; 113 Cong. Rec. 6254 (daily ed., May 25, 1967) (statement of Rep. Hebert); 113 Cong. Rec. 8052 (daily ed., June 12, 1967) (statement of Sen. Russell). This is not such a case.

The reliance by the court below upon pre-§10(b)(3) cases is misplaced. All of these cases cited by the court, *infra*, at p. 4a, with the possible exception of *Muhammad Ali* v. *Breathitt*, 268 F. Supp. 63 (W.D. Ky. 1967), involve registrants seeking pre-induction review of individual classifications. These cases hold:

1. That a registrant may not seek review of an alleged error in classification made by his Selective Service Board unless he has exhausted all of his administrative remedies;
2. That his remedies are not exhausted until he has refused to submit to induction; and
3. Even then, the decision of the Selective Service System is final, so that review is limited to a determination of whether there is any basis in fact for the classification accorded to the registrant.

*Muhammad Ali* v. *Breathitt, supra,* is a District Court decision which cites no authority for its holding.

The requirement of exhaustion of administrative remedies in the normal case is designed to enable the Selective Service System to decide controversies within its jurisdiction, and to avoid the courts acting as super-draft boards to consider issues

which may ultimately be rendered moot by administrative action. However, the claims the plaintiffs are raising here are not cognizable by any body within the Selective Service System.

The authority of the local boards, appeal boards and national boards under 50 App. U.S.C. §460(b)(3), is limited to the "registration, examination, classification, selection, assignment, [and] delivery for induction" of registrants. These boards lack the power to hear and adjudicate the questions raised by plaintiffs and it would be illogical to require the plaintiffs to exhaust their non-existent administrative remedies.

*Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817 (2nd Cir. 1967), recognized that in this situation exhaustion of administrative remedies is not required. In *Wolff*, two registrants brought an action to compel their draft boards to reclassify them, claiming that they had been classified I-A solely because of their participation in demonstrations protesting United States involvement in Vietnam. The Second Circuit held that a justiciable controversy was presented and a court could intervene to adjudicate their claim. The court stated, at p. 825:

> "When there is nothing to be gained from the exhaustion of administrative remedies and the harm from the continued existence of the administrative ruling is great, the courts have not been reluctant to discard this doctrine."

See *McNeese* v. *Board of Education*, 373 U.S. 668; *Skinner and Eddy Corp.* v. *United States*, 249 U.S. 557; *United States* v. *Mitchell*, 369 F.2d 323 (2nd Cir. 1966), *cert. denied* 386 U.S. 972.

(2) The court below did not deal with plaintiffs' contention, both briefed and argued below, that §10(b)(3) is uncon-

stitutional if it is interpreted as barring a court from entertaining a registrant's constitutional claims in a pre-induction suit.

The decision of the court below forces a person to violate a statute and risk severe criminal penalties in order to raise his constitutional claims. This Court, in a series of cases beginning with *Ex parte Young, supra,* has held that such procedure violates due process. There the Court said, at pp. 146-148:

> "The necessary effect and result of such legislation [making judicial review impossible without commission of a misdemeanor] must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. The result would be a denial of any hearing to the company. . . . It may therefore be said that when the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.
>
> * * *
>
> We hold, therefore, that the provisions of the Acts relating to the enforcement of the rates, . . . by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."

Accord: *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331; *St. Louis, I.M.& S. Ry. Co.* v. *Williams*, 251 U.S. 63; *Missouri Pacific Railway Company* v. *Tucker*, 230 U.S. 340; *Natural Gas Pipe Line Co. of America* v. *Slattery*, 302 U.S. 300; see *Terrace* v. *Thompson*, 263 U.S. 197.

The latest decision of this Court in which this issue is discussed is *Reisman* v. *Caplin*, 375 U.S. 440. Here petitioners, who were served with a subpoena, argued that the penalties of contempt for non-compliance with the subpoena were so severe as to amount to a denial of judicial review to test the validity of the subpoena. The Court distinguished *Ex parte Young, supra*, and *Oklahoma Operating Co.* v. *Love, supra*, by noting that in those cases the rates could only be attacked by failing to comply with the orders, while here the statute provided plaintiffs with numerous opportunities to challenge the validity of the subpoena before penalties for non-compliance were imposed. The Court also pointed out, at p. 448, that if the statute permitted the Commissioner of Internal Revenue to automatically proceed and secure an "attachment" for contempt should the plaintiff fail to comply with the subpoena "such a sanction, even though temporary, might be a penalty severe enough to bring the section within the rationale of *Young, supra* . . ."

The importance of this issue is highlighted by the fact that at least two cases have held that §10(b)(3) is unconstitutional if it is viewed as barring pre-induction review of a registrant's classification. *Petersen* v. *Clark*, Civil No. 47888 (N.D. Cal., May 28, 1968); *Gabriel* v. *Clark*, Civil No. 49419 (N.D. Cal., June 28, 1968); see also Brief of Solicitor General in *Oestereich* v. *Selective Service System Local Board No. 11, et al.* (Sup. Ct., No. 1246, Oct. Term, 1967).

3. The plaintiffs alleged in the complaint that the matter in controversy exceeded "exclusive of interest and costs the

sum of $10,000." They concede, however, that they are unable to prove that any of them will suffer a precise monetary loss of more than $10,000 by reason of being inducted into the Army.[5] Their claim, involving the right to be free from the application of an unconstitutional statute, is not capable of valuation. The court below held that since the plaintiffs' claims involved "rights not capable of valuation in money", *infra*, at p. 6a, they had not satisfied the jurisdictional amount requirement of 28 U.S.C. §1331.

The court below acknowledged that the decisions on the question presented herein are not uniform. Cases supporting the decision below are cited by the court, *infra*, at pp. 6a-7a. Those supporting plaintiffs' position are cited by the court, *infra*, at p. 7a, footnote 4. In addition to the latter see *Swafford* v. *Templeton*, 185 U.S. 487; *Giles* v. *Harris*, 189 U.S. 475 and *Giancana* v. *Johnson*, *supra* (dissenting opinion). For the reasons stated herein, plaintiffs urge that the latter line of cases express the correct view concerning the jurisdictional amount requirement.

The purpose of the $10,000 jurisdictional amount requirement was set forth in the Senate Report which accompanied the 1958 bill raising the jurisdictional amount requirement from $5,000 to its present $10,000 figure. The report stated

> "The recommendations of the Judicial Conference regarding the amount in controversy, which this committee approves, is based on the premise that the amount

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[5] The amount in controversy is calculated as of the time of the commencement of the action. *Anderson-Thompson, Inc.* v. *Logan Grain Company*, 238 F.2d 598 (10th Cir. 1956); *Gulf Refining Company* v. *Price*, 232 F.2d 25 (5th Cir. 1956). The plaintiffs here have submitted affidavits attached to their motion papers for a preliminary injunction indicating that plaintiff Boyd was unemployed, plaintiff Hendrix was earning $70 per week, plaintiff Hughes was earning $60 per week and plaintiff Taylor was earning $73 per week.

> should be fixed at a sum of money that will make jurisdiction available in all *substantial controversies* where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of *petty controversies*." S. Rep. No. 1830, 85th Cong., 2d Sess. (1958), (emphasis added).

Should a Federal court dismiss for want of jurisdictional amount, the plaintiffs may well be left without a forum in which to raise their claims. As the dissenting opinion of Judge Edelstein notes, *infra*, at p. 14a, there is doubt whether a state court has the power "to act against the federal Selective Service System."[6] This point, although briefed and argued by plaintiffs, was not discussed by the court below.

The decisions in New York are quite clear in holding that state courts lack power to enjoin Federal officials. In *Matter of Schmoll, Inc.* v. *Federal Reserve Bank*, 286 N.Y. 503 (1941), *cert. denied* 315 U.S. 818, the plaintiff sued the Federal Reserve Bank of New York in state court to require the bank to exercise a duty under the 1930 Tariff Act. The court affirmed the lower court's dismissal of the proceeding on the ground that a state court may not

> "control the manner in which a federal agency performs . . . its function and duties under . . . [a] federal statute where the Federal government has exclusive jurisdiction. Assumption of such power would hamper orderly government and ignore the division of the fields of government created by the Constitution." 286 N.Y. at 509.

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[6] It is clear that state courts also lack power to inquire, by writ of *habeas corpus*, into the detention of persons held in Federal custody, *Tarble's case*, 80 U.S. (13 Wall.) 597, or to issue writs of mandamus against Federal officials, *M'Clung* v. *Silliman*, 19 U.S. (6 Wheat) 598.

Similarly in *Wasservogel* v. *Megerowitz*, 300 N.Y. 123 (1949), the court held, at p. 133, that it could not hold invalid an administrative order issued by the Federal Office of Rent Control since to do so would be "nothing less than an assertion of control of the manner in which the Federal rent office performed the function assigned to it by Congress." See *Fox* v. *34 Hillside Realty Corp.*, 87 N.Y.S. 2d 351 (Sup. Court 1949), *aff'd* 276 App. Div. 994 (1st Dept., 1950); *Fieger* v. *Glen Oaks Village, Inc.*, 309 N.Y. 527 (1956). *Pennsylvania Turnpike Commission* v. *McGinnis*, 179 F. Supp. 578 (E.D. Pa., 1959), *aff'd per curiam* 278 F.2d 330 (3rd Cir. 1960), *cert. denied* 364 U.S. 820, which reaches the same conclusion, discusses many of the relevant cases in the field.

## CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

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September 4, 1968

# APPENDIX


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## Opinion of the District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

67 Civil 2529

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JAMES BOYD, BERNARD HUGHES, CECIL RALPH HENDRIX, and CHARTER TAYLOR, JR.,

*Plaintiffs,*

*against*

RAMSEY CLARK, as Attorney General of the United States, LEWIS B. HERSHEY, as Director of Selective Service of the United States, PAUL AKST, as Director of Selective Service of the City of New York, SELECTIVE SERVICE BOARD No. 44 of the City of New York and SELECTIVE SERVICE BOARD No. 2 of the City of New York,

*Defendants.*

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(Argued January 2, 26, 1968 Decided June 26, 1968)

Before: Hays, Circuit Judge, and Edelstein and McLean, District Judges.

Victor Rabinowitz, New York, New York (Dorian Bowman, and Rabinowitz, Boudin & Standard, New York, New York, on the brief), *for Plaintiffs,*

Lawrence W. Schilling and Arthur S. Olick, Assistant United States Attorneys (Robert M. Morgenthau, United States Attorney for the Southern District of New York, on the brief), *for Defendants.*

*Opinion of the District Court*

HAYS, *Circuit Judge:*

This is an action brought by four Selective Service registrants challenging the constitutionality of the student deferments provided in Section 6(h)(1) of the Military Selective Service Act of 1967, 50 U.S.C.A. App. §456(h)(1) (Supp. 1967), on the grounds that student deferments (1) discriminate against persons who are economically unable to attend college and (2) are arbitrary and bear no reasonable relationship to the purpose of the Act.[1] Plaintiffs, who are all classified I-A,* allege that they are unable to secure student deferments solely because they lack the financial means to attend college. The injury claimed is an increased likelihood of induction, because, so the plaintiffs allege, registrants who are deferred as students thereby ordinarily postpone their induction for several years and in many cases escape service entirely by acquiring other deferments. The relief sought is a decree that the Act is unconstitutional as applied to plaintiffs and an injunction restraining defendants from ordering plaintiffs inducted and from prosecuting them for violation of the Act.

At plaintiffs' request a three-judge court was convened pursuant to 28 U.S.C. §§2282 and 2284.

We turn first to a consideration of defendants' motion to dismiss the complaint for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

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*We are informed that during the period that this case was sub judice some of the plaintiffs were reclassified. However since at least one plaintiff is still classified in 1-A, reclassification of others does not affect the result which we have reached.

*Opinion of the District Court*

I

Defendants urge that this court is deprived of jurisdiction of the subject matter by Section 10(b)(3) of the Act, 50 U.S.C.A. App. §460(b)(3) (Supp. 1967):

> "... No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Although the section makes no mention of the availability of habeas corpus after induction, it is doubtful that Congress intended to eliminate that traditional remedy for challenging draft classification. The legislative history indicates that the statutory provision was intended merely as a codification of existing case law. See 113 Cong. Rec. 8052 (Daily ed. June 12, 1967) (statement of Sen. Russell); H.R. Rep. No. 267, 90th Cong., 1st Sess. pp. 30-31 (1967).

Plaintiffs claim that Section 10(b)(3) was not designed to cover this kind of suit. They cite references in the statute and legislative history, supra, to the "no basis in fact" test and "exhaustion of administrative remedies" as evidence that Congress

was concerned only with the typical case of the registrant who claims that his local Selective Service Board classified him in the wrong category. (Plaintiffs concede that they are properly classified I-A.)

Even if plaintiffs' argument as to the inapplicability of the statute were to be accepted, they would gain little. It would still be necessary for them to establish the inapplicability of the pre-1967 decisions holding that defense to a criminal proceeding and post-induction writ of habeas corpus are the exclusive means by which classifications may be challenged. See, e.g., *Estep* v. *United States,* 327 U.S. 114 (1946); *Witmer* v. *United States,* 348 U.S. 375, 377 (1955); *Watkins* v. *Rupert,* 224 F.2d 47 (2d Cir. 1955); *Schwartz* v. *Strauss,* 114 F.Supp. 438 (S.D. N.Y.), aff'd on opinion below, 206 F.2d 767 (2d Cir. 1953).

A registrant who has not received and acted on an order of induction cannot get injunctive relief because he cannot show "irreparable harm," *Watkins* v. *Rupert,* supra at 48, *Muhammad Ali* v. *Breathitt,* 268 F. Supp. 63, 65 (W.D.Ky. 1967); because he is not "aggrieved," *Daniels* v. *United States,* 372 F.2d 407, 414 (9th Cir. 1967); because he lacks "standing" in light of the lack of immediate danger of direct injury, *Katz* v. *United States,* 66 Civ. 497 (S.D.N.Y. Aug. 8, 1966); because the action is "premature" or "not ripe," *Feldman* v. *Local Board No. 22,* 239 F. Supp. 102, 105-06 (S.D.N.Y. 1964), *Westerbeke* v. *Local Draft Board No. 2,* 118 F.Supp. 441, 444 (S.D.N.Y. 1954); and because the dispute may become "moot" or "academic," *Wolff* v. *Selective Service Local Board No. 16,* 372 F.2d 817, 823 (2d Cir. 1967), *Feldman* v. *Local Board No. 22,* supra at 105.

In *Wolff* v. *Selective Service Local Board No. 16*, supra, plaintiffs alleged that they were reclassified I-A for participating in a draft protest. The court expressed itself as concerned with the chilling effect on the exercise of first amendment rights created by the threat of reclassification and held that plaintiffs had sustained a legally cognizable injury for which they could seek injunctive relief.[2] However, the court said that in the ordinary case, injunctive relief would be inappropriate.

> ". . . in the usual run of Selective Service cases, the registrant must wait until he receives an induction order, and has either obeyed it or is prosecuted for refusing to obey it, before the courts may review his classification. This is so because, in nearly all cases, it is service in the armed forces itself, and not the mere classification, that constitutes the alleged injury. Thus, should it develop that for independent reasons such as physical disability the registrant is not actually wanted by the armed forces, he will never have sustained a legally redressible injury. Perhaps it is true that a mere adverse classification will cause a disarray of plans and emotional upset but this is an acceptable price to pay for the efficient functioning of the Selective Service. . . " Id. at 823.

Courts, commentators and Congress agree that any incidental inconvenience to plaintiffs is outweighed by the value of keeping the Selective Service system from becoming entangled in litigation which may prove unnecessary. See, e.g., *Falbo* v. *United States*, 320 U.S. 549, 554-55 (1944); Comment, Fairness and Due Process Under the Selective Service System, 114 U.Pa.L.Rev. 1014, 1018-19 (1966); H.R. Rep. No. 267, 90th Cong., 1st Sess. pp. 30-31.

Since plaintiffs may never be required to report for induction, we hold that their claim is prematurely made and is not now ripe for adjudication.

II

Even if we were to conclude that plaintiffs' claims were justiciable, however, we would be required to dismiss the complaint for want of jurisdiction. Jurisdiction of this suit is claimed under 28 U.S.C. §1331, the general federal question statute, which requires that "the matter in controversy" exceed "the sum or value of $10,000." Plaintiffs' counsel concedes that he cannot prove that any of the plaintiffs will suffer a monetary loss of more than $10,000 by reason of the injury alleged.

It is firmly settled law that cases involving rights not capable of valuation in money may not be heard in federal courts where the applicable jurisdictional statute requires that the matter in controversy exceed a certain number of dollars. The rule was laid down in *Barry* v. *Mercein,* 46 U.S. (5 How.) 103 (1847), a child custody case.[3] The "right to the custody, care, and society" of a child, the court noted, "is evidently utterly incapable of being reduced to any pecuniary standard of value, as it rises superior to money considerations." 46 U.S. at 120. Since the statute permitted appeals only in those cases where the "matter in dispute exceeds the sum or value of two thousand dollars," the court concluded that it was without jurisdiction:

> "The words of the act of Congress are plain and unambiguous .... There are no words in the law, which by any just interpretation can be held to . . . authorize us to take cognizance of cases to which no test of money value can be applied." 46 U.S. at 120.

Subsequent decisions have followed this reasoning. See *Kurtz* v. *Moffitt*, 115 U.S. 487, 498 (1885); *Youngstown Bank* v. *Hughes*, 106 U.S. 523 (1882); *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964), cert. denied, 379 U.S. 1001 (1965); *Carroll* v. *Somervell*, 116 F.2d 918 (2d Cir. 1941); *United States ex rel. Curtiss* v. *Haviland*, 297 Fed. 431 (2d Cir. 1924); 1 Moore, Federal Practice ¶0.92[5] (2d ed. 1964).[4]

The action is dismissed for lack of a justiciable controversy and for want of jurisdiction.

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**Footnotes**

[1] A somewhat similar challenge to student deferments was rejected in *Talmanson* v. *United States*, 386 F.2d 811 (1st Cir. 1967) on grounds other than those upon which we rely.

[2] It can be argued that Section 10(b)(3) has overruled *Wolff*. See *Carpenter* v. *Hendrix*, 277 F.Supp. 660 (N.D.Ga. 1967); H.R.Rep. No. 267, 90th Cong., 1st Sess. pp. 30-31 (1967); 81 Harv.L.Rev. 685, 689 (1968).

[3] See, e.g., *Perrine* v. *Slack*, 164 U.S. 452 (1896); *Clifford* v. *Williams*, 131 Fed. 100 (C.C.N.D. Wash. 1904).

[4] A few decisions have refused to dismiss suits for damages for invasion of rights which appear impossible of pecuniary evaluation on the ground that a jury might award sufficient damages to satisfy the jurisdictional amount. See *Wiley* v. *Sinkler*, 179 U.S. 58, 65 (1900) (rejection of vote); *Brickhouse* v. *Brooks*, 165 Fed. 534, 543 (C.C.E.D.Va. 1908) (rejection of vote). See also *Hynes* v. *Briggs*, 41 Fed. 468 (C.C.E.D. Ark. 1890) (false imprisonment for fifteen minutes).

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/s/ Paul R. Hays
*U.S.C.J.*

/s/ Edward C. McLean
*U.S.D.J.*

Dated: June 25, 1968

EDELSTEIN, *D.J.*, dissenting:

I dissent.

I would deny defendants' motion to dismiss the complaint for lack of jurisdiction of the subject matter and for failure to state a claim upon which relief can be granted. Since the majority opinion separates the two grounds for dismissal in separately numbered portions of the opinion, my dissent will follow a similar sequence.

I

In the first place, it is helpful to point out what this case is not—it is not a challenge to an individual's personal Selective Service classification in the *Estep* v. *United States*, 327 U.S. 114 (1946), tradition. Plaintiffs* clearly and unequivocally concede that under the present system of Selective Service classifications that their individual classifications are indeed correct. Section 10(b)(3) of the Selective Service Act, 50 U.S.C.A. App. §460(b)(3) (Supp. 1967), relied upon so heavily by the defendants, is by its very language not relevant to the set of facts at bar for it states ". . . No judicial review shall be made of the *classification or processing of any registrant* by local boards, appeal boards, or the President . . . ." (emphasis added). The plaintiffs are not objecting to their individual classifications or processing within the system as it exists but

*The court has been advised by the United States Attorney, by letter dated June 19, 1968, that plaintiff Bernard Hughes was classified II-S by his local board on June 11, 1968, that plaintiff Ralph Hendrix was classified II-A by his local board on April 9, 1968, that plaintiff James Boyd was classified I-A by his local board, after his request for conscientious objector status was denied, on June 10, 1968, and that a response is being awaited from plaintiff Charter Taylor, Jr.'s local board as to his current status. These new developments have no effect on this dissent except for the possibility that it may only apply to the plaintiff Boyd.

are instead seriously objecting to the constitutionality of the whole system of classifying and processing due to an alleged unconstitutional taint.

The majority opinion, in broad gauge, lists several excerpts from various cases to establish a rationale for the proposition that a registrant who has not received and acted on an order of induction cannot get injunctive relief. The actual rationale is, as later mentioned in the majority opinion, that "any incidental inconvenience to plaintiffs is outweighed by the value of keeping the Selective Service System from becoming entangled in litigation which may prove unnecessary." In short, one person may not burden the Selective Service System with his individual problems until he is actually "under the gun." The cases cited by the majority opinion, with one exception, *Muhammad Ali* v. *Breathitt*, 260 F. Supp. 63 (W.D. Ky. 1967), are all classification cases and easily explainable in the light of the true rationale.

In the case at bar, the rationale is not agreeable to reason. These plaintiffs are attacking an integral part of the Selective Service System. This case is an attempt to challenge the concept of student deferments which is a basic part of the Selective Service whole. It serves no purpose to defer this case for later, as in the case of individual classifications, since if the System is indeed unconstitutional, it is better to strike it down now before more harm be done, while if the System is constitutional, it serves the national purpose to vindicate it in these times when the System is subject to intense and often hostile questioning by large segments of the American people. To the extent that *Muhammad Ali* v. *Breathitt, supra,* would call for a contrary result, I would decline to follow it.

*Opinion of the District Court*

In the usual classification case, the plaintiff attempts to demonstrate why he should not be classified I-A. His grievance is not actually his alleged misclassification but his contemplated induction into the armed forces as a result of the alleged error in classification. In the case at bar, the plaintiffs are not complaining about military service as such. What they are complaining about is the increased likelihood that they, rather than others who hold a II-S deferment, will have to serve. They allege that an unconstitutional preference has been established and that their increased likelihood of induction is the harsh result of that preference. This increased likelihood of induction exists now—indeed, it would end once the plaintiffs are in fact inducted. This alleged unfairness is harmful both in tangible and intangible ways. It pervades their entire lives and acts as an inhibiting force upon their daily activities. It is claimed by plaintiffs that numerous II-S classification holders are in fact never called for military service for a variety of reasons. If this is true, and it must be emphasized that plaintiffs have not been given the chance to prove this contention, then plaintiffs are in the position of being liable for national service while others are not. This is a contingent liability of a very painful sort. It is difficult enough to be uncertain as to whether or not one must serve in terms of planning a life for oneself, but it is indeed lamentable that this must be so when others are relatively free from this predicament. It is painful enough to feel that one is being discriminated against, but how much worse must it be if that is really the situation? The draft and the possibility of its being a monstrous discrimination against the underprivileged is a topic which has caused concern to many. The plaintiffs must be given a chance to demonstrate that the student deferments are indeed an unconstitutional dis-

crimination so that the Selective Service System will either stand free from doubt or be called to task. The plaintiffs, as a part of the general public most immediately affected by the System, have the standing to free their minds from their bitter certainty that the System is weighted against them. They have the standing to seek freedom of their persons from the greater chance of a service which, though honored and honorable, is not one of their choice if others, for reasons which our Constitution holds to be invalid, are spared.

The doctrine of ripeness is sometimes invoked to bar an adjudication. All that the doctrine of ripeness means is that a court will not decide a case until it is practical to do so. In considering whether or not a case is ripe a court looks to see if a dispute has reached that stage in its maturing in which judicial intervention is the best solution and whether that intervention can effectively settle the matter. In the case at bar the time for decision seems suitable now. It is as important to the Selective Service System as it is to the plaintiffs to have this unsettled and disquieting question resolved at the earliest possible time.

In *Wolff* v. *Selective Service Local Board No. 16,* 372 F.2d 817 (2d Cir. 1967), a classification case, two plaintiffs were held entitled to pre-induction relief. The court in *Wolff* decided that since the plaintiffs were classified I-A as a punishment for participating in a draft protest, this type of reclassification would have the effect of stifling free speech and was therefore an interference with first amendment rights and immediately redressible in court. If that court were merely worried about the first amendment rights of *Wolff* and his co-plaintiff, it might very well have required them to wait until they were actually inducted. After all, they were already reclassified I-A, what

more could the local board do to them except call them for induction? There was nothing else that could have been done to interfere with their first amendment rights. The court must have been looking at the chilling effect on the exercise of first amendment rights created by the threat of reclassification as that threat related to others not yet reclassified. *Wolff* was not the case of two individuals and their respective reclassifications but in actuality it dealt with an entire class of war protesting college students. The same urgency for a decision on the merits is presented by the case at bar. Now, when there are grumblings to be heard, is the time to tell not just these plaintiffs but the whole class of non-students whether or not they are being deprived of their fifth amendment rights.

The majority opinion infers that plaintiffs' proper method of procedure is to be inducted and then to proceed by habeas corpus. The opinion candidly expresses the possibility that habeas corpus may be precluded by Section 10(b)(3) of the Selective Service Act although it does belittle this possibility. Research has indicated no case in which an induction was challenged on grounds similar to those in the case at bar by petition of habeas corpus. The habeas cases are all classification cases and this is not a classification case. The plaintiffs are not challenging their classifications and after induction they would be hard pressed to say that they should not be soldiers. In addition, by the time a habeas petition could be brought their claim would be overripe. The increased likelihood of induction would have silently slipped into the reality of induction and plaintiffs' claim would have expired.

In any event, possibility of habeas or no, this is the time to come to grips with plaintiffs' contentions on the merits. This is a three-judge statutory court empaneled to hear and

determine constitutional issues. Such an issue is present now and it should be reached. Habeas corpus is a remedy for a wrong already done—it is not a proceeding to hear and determine in the first instance.

II

The majority opinion holds that this court is without jurisdiction since jurisdiction is claimed by the plaintiffs under 28 U.S.C. §1331 and the matter in controversy does not exceed the sum or value of $10,000.00. The majority opinion points out that plaintiffs' counsel has conceded that he cannot prove that any of the plaintiffs will suffer a monetary loss of more than $10,000.00.

In the first place, it should be indicated that the jurisdictional amount question was raised by the court *sua sponte*. Plaintiffs, in their amended complaint, alleged that the matter in controversy exceeds the sum of $10,000.00 and this allegation was not denied by the Government. Often a district court will raise this question itself, but such a procedure is only utilized to keep picayune cases in the state small claims courts where they belong.

Two different, although similar, rationales have been given for the jurisdictional amount portion of the statute. The Supreme Court, in *Healy* v. *Ratta*, 292 U.S. 263 (1934), spoke as follows:

> From the beginning suits between citizens of different states, or involving federal questions, could neither be brought in the federal courts nor removed to them, unless the value of the matter in controversy was more than a specified amount. Cases involving lesser amounts have been left to be dealt with exclusively by state

> courts, except that judgment of the highest court of a state adjudicating a federal right may be reviewed by this Court. Pursuant to this policy the jurisdiction of federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. (footnote omitted). The policy of the statute calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. (citation omitted). Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined. (citations omitted). Id. at 269-70.

The case at bar clearly does not involve any notions of federalism. It is apparent that a state court would be powerless to act against the federal Selective Service System.

In *Giancana* v. *Johnson*, 335 F.2d 366 (7th Cir. 1964), *cert. denied*, 379 U.S. 1001 (1965), the court quoted from the Senate Report which accompanied the bill which raised the jurisdictional amount to $10,000.00:

> "The recommendations of the Judicial Conference regarding the amount in controversy, which this committee approves, is based on the premise that the amount should be fixed at a sum of money that will make jurisdiction available in all substantial controversies where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert

> the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." *Id.* at 368-69 n. 7, quoting from S. Rep. No. 1830, 85th Cong., 2d Sess. (1958), 1958 U.S. Code Cong. & Ad. News, pp. 3099, 3101.

This case is hardly a petty controversy with which this court would fritter away its time if it were to hear this case on its merits.

The dissent in *Giancana* heartily disagreed with the majority's dismissal for want of jurisdictional amount in controversy:

> It is incongruous to hold that a formal allegation of the amount in controversy is necessary when personal liberties of the magnitude alleged in the complaint and found by the district court are involved. To require a dollar value to be specifically averred in these circumstances is to exalt form over substance.
>
> In my opinion the fact that there was no formal allegation of the requisite jurisdictional amount did not prevent the district court from assuming jurisdiction. The complaint alleged that defendant and his agents deprived plaintiff of the use of his home and that they violated his right of privacy and personal liberty. From these allegations the district court could infer, contrary to what the majority indicates, that the amount in controversy exceeded $10,000.00. *Id.* at 371.

In the case at bar, plaintiffs did aver that the amount in controversy exceeds $10,000.00. The court could easily assume that freedom from an unconstitutional discrimination exceeds the sum or value of $10,000.00. This is not the nineteenth century where property rights were valued over human rights.

If a man can sue in federal court on the allegation that the government is injuring his property, he certainly must be allowed to sue on the allegation that the government is oppressing him personally. Although it might be said that human rights are incapable of valuation and hence valueless, it is better to view them as incapable of valuation but only because they are of infinite value. The latter view is, in my humble opinion, the only view compatible with the commitment of our nation to a belief in the dignity of man and the inherent worth of a free individual in a free society.

It might even be that if Section 1331 were faced squarely and plaintiffs were required to demonstrate that the matter in controversy was worth some precise monetary amount (a demonstration that plaintiffs concededly cannot make), that Section 1331 is unconstitutional as applied to the situation at bar. Since plaintiffs cannot bring their action in a state court, if Section 1331 is used to cut them off from a federal forum they are left with a claim of governmental unfairness with no situs of adjudication. They have not even an administrative tribunal available to hear their complaint since the local draft board, the appeals board, or the national board are obviously without power to declare unconstitutional a portion of the statute which created them. Is it compatible with the fifth amendment's guarantee of due process to sanction such a state of affairs?

As courts are justifiably loath to declare acts of Congress unconstitutional if there exists another less drastic method of dispensing justice, one solution out of this court created jurisdictional dilemma is to accept plaintiffs' allegation that the amount in controversy exceeds $10,000.00 either on the theory that allegations not denied are deemed established or on the

theory that an alleged discriminatory interference is inherently worth more than $10,000.00.

In *Townsend* v. *Zimmerman*, 237 F.2d 376 (6th Cir. 1956), the amount in controversy requirement was not even touched upon. Judge (now Mr. Justice) Stewart reversed the denial of a pre-induction injunction in a classification case when the local board denied plaintiff his right of an administrative appeal. Neither the court's opinion, nor the briefs submitted by the parties, nor plaintiff's complaint mentioned any jurisdictional amount or any statutory basis of jurisdiction for that matter.

Since this controversy is ripe for adjudication and since the jurisdictional requirements of 28 U.S.C. §1331 are met, this court should proceed to hear this case on its merits.

/s/ David N. Edelstein
*U.S.D.J.*

Dated: New York, N.Y.
June 25, 1968

**Judgment of the District Court**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

67 Civil 2529

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JAMES BOYD, BERNARD HUGHES, CECIL RALPH HENDRIX, and CHARTER TAYLOR, JR.,

*Plaintiffs,*

*against*

RAMSEY CLARK, as Attorney General of the United States, LEWIS B. HERSHEY, as Director of Selective Service of the United States, PAUL AKST, as Director of Selective Service of the City of New York, SELECTIVE SERVICE BOARD No. 44 of the City of New York and SELECTIVE SERVICE BOARD No. 2 of the City of New York,

*Defendants.*

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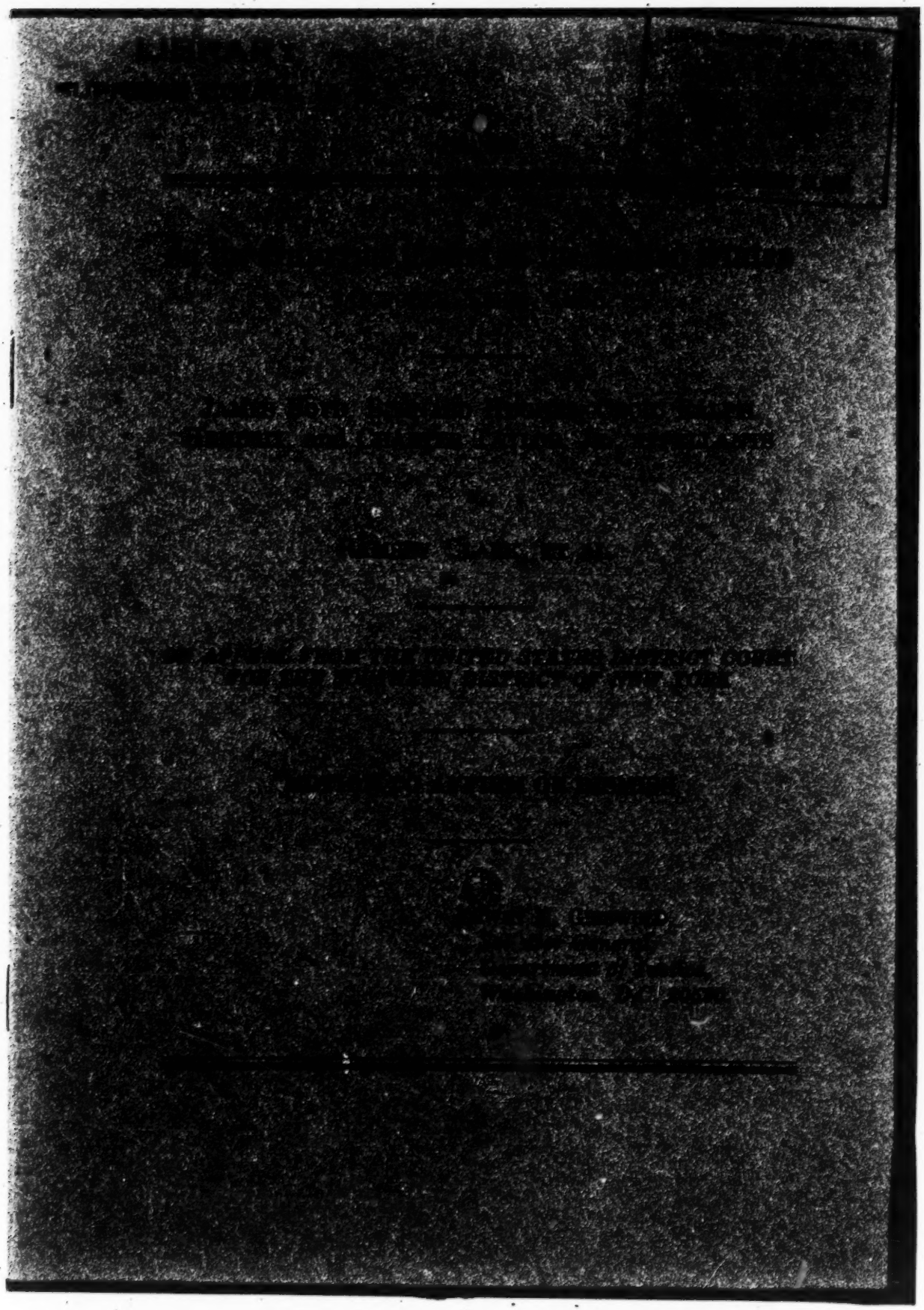
The issues in the above entitled action having been argued on January 2 and 26, 1968, before a three Judge Court convened pursuant to 28 U.S.C. Sections 2282 and 2284, consisting of the Honorable Paul R. Hays, United States Circuit Judge, Honorable David N. Edelstein and the Honorable Edward C. McLean, United States District Judges, and the Court having on June 26, 1968, filed its memorandum opinion dismissing the action for lack of justiciable controversy and for the want of jurisdiction, the Honorable David N. Edelstein dissenting, it is

ORDERED, ADJUDGED and DECREED: That the defendants RAMSEY CLARK, as Attorney General of the United States, LEWIS B. HERSHEY, as Director of Selective Service of the United States, PAUL AKST, as Director of Selective Service

of the City of New York, SELECTIVE SERVICE BOARD No. 44 of the City of New York and SELECTIVE SERVICE BOARD No. 2 of the City of New York, have judgment against the plaintiffs JAMES BOYD, BERNARD HUGHES, CECIL RALPH HENDRIX and CHARTER TAYLOR, JR., dismissing the complaint.

Dated: New York, N.Y.
July 1, 1968

/s/ John J. Olear, Jr.
Clerk



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# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 490

JAMES BOYD, BERNARD HUGHES, CECIL RALPH HENDRIX, and CHARTER TAYLOR, JR., APPELLANTS

*v.*

RAMSEY CLARK, ET AL.

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK*

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## MOTION TO AFFIRM OR DISMISS

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Pursuant to Rule 16(1) of the Rules of this Court, appellees move to affirm the judgment of the district court or, in the alternative, to dismiss the appeal.

### STATEMENT

Appellants, four Selective Service registrants, brought the instant action to challenge the constitutionality of the system of draft deferments for college students provided for in Section 6(h)(1) of the Military Selective Service Act (50 U.S.C. App. (Supp. III) 456(h)(1)). They contended that the availability

of such deferments discriminates against those financially unable to attend college, and bears no reasonable relationship to the purposes of the Act. A three-judge district court was convened. The court, one judge dissenting, dismissed the action on two grounds: (1) that pre-induction judicial review of Selective Service classifications is prohibited by Section 10(b)(3) of the Act (50 U.S.C. App. (Supp. III) 460(b)(3)); and (2) that appellants had failed to show that the $10,000 jurisdictional amount required by 28 U.S.C. 1331 for federal question jurisdiction was involved (J.S. App. 1a-7a, 18a-19a). The latter ground of dismissal was based on counsel's concession that none of the plaintiffs could prove a monetary loss of more than $10,000 because of the discrimination alleged. The district court stayed the induction of two of the appellants—Boyd and Taylor—pending the disposition of this appeal. The other two plaintiffs—Hughes and Hendrix—received deferments while the action was pending, and thus do not now face induction.

## ARGUMENT

1. The district court correctly held that it lacked jurisdiction because the matter in controversy does not exceed $10,000. In suits brought by Selective Service registrants to enjoin their induction, the only available grounds for federal jurisdiction are the general grants of federal question and diversity jurisdiction, both of which apply only where "the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs" (28 U.S.C. 1331,

1332).[1] It has been repeatedly held that actions asserting rights not capable of monetary valuation do not satisfy the requirement of jurisdictional statutes which require that the matter in controversy exceed a specified dollar sum. *Barry* v. *Mercein*, 5 How. 103 (right to custody of a child); *Kurtz* v. *Moffitt*, 115 U.S. 487, (writ of habeas corpus); *Youngstown Bank* v. *Hughes*, 106 U.S. 523 (bank's suit to enjoin administrative subpoena which would "unlawfully expose its business affairs" and "lessen public confidence"); *United States ex rel. Curtiss* v. *Haviland*, 297 Fed. 431 (C.A. 2) (inquisition of lunacy); *Giancana* v. *Johnson*, 335 F. 2d 366 (C.A. 7) certiorari denied, 379 U.S. 1001 (action to enjoin FBI agents from conducting close surveillance of plaintiff). See, also, *Hague* v. *C.I.O.*, 307 U.S. 496, 507-508.[2] This rule was recently applied in the Selec-

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[1] The Administrative Procedure Act does not provide a basis for federal jurisdiction over such suits, for Section 13 (b) of the Military Selective Service Act provides that "[a]ll functions performed under this title * * * shall be excluded from the operation of the Administrative Procedure Act * * * [except as to section 3 of the APA, pertaining to publication of agency regulations]" (50 U.S.C. App. 463(b)). Nor does the Military Selective Service Act itself confer jurisdiction. Even if it were held that Section 10(b)(3) of the Act does not preclude jurisdiction in pre-induction civil suits, neither that section, nor any other provision of the Act, can be construed as an affirmative grant of federal jurisdiction.

[2] In *Hague*, involving an injunctive suit against city officials to protect First Amendment rights, a majority of the Court (although disagreeing on a subsidiary point) sustained jurisdiction under 28 U.S.C. 1343(3), on the explicit or implicit premise that jurisdiction did not lie under 28 U.S.C. 1331 (see 307 U.S. at 507-508 (opinion of Roberts, J.), 519, 527-

tive Service context to require proof of the jurisdictional amount under Section 1331 in a suit to review reclassifications, in a case decided before the enactment of the statutory bar on pre-induction judicial review. *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 826 (C.A. 2).

The congressional purpose behind Section 1331 might have been simply to keep "petty" cases out of the federal courts, as the dissenting judge suggested (J.S. App. 13a-15a). And this case may well be viewed as involving a "substantial" enough claim to warrant the attention of the federal courts (see S. Rep. No. 1830, 85th Cong., 2d Sess., pp. 3-4). However, to achieve its purpose Congress adopted a monetary standard, which the courts are not free to ignore in a particular situation where it operates to keep a case deemed otherwise significant out of the federal courts. In the various Civil Rights Acts and in other statutes Congress has conferred federal jurisdiction without regard to the amount in controversy. *E.g.*, 28 U.S.C. 1343, 1344, 1337, 1338, 1339, 1340, 1346; 46 U.S.C. 688 (Jones Act); 45 U.S.C. 51 *et seq.* (Federal Employers' Liability Act). That Congress has not done so for cases like this one may well result in an "unfortunate gap in the statutory jurisdiction of the federal courts." *Wolff* v. *Selective Service Local Board No. 16*, *supra*, 372 F.2d at 826. But that seems to be the effect of the plain language of Section 1331.

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532 (opinion of Stone, J.), 532 (opinion of Hughes, C.J.)), The dissenting Justices indicated no contrary view (see 307 U.S. at 532-533).

There is no conflict of decisions on this point. The cases to which petitioner refers (J.S. 13) were damage suits in which the complaint asserted a claim for a sum over the required amount, and it was possible that a jury would award that amount. *E.g.*, *Wiley* v. *Sinkler*, 179 U.S. 58 (damage claim for rejection of vote), distinguished in *Hague* v. *C.I.O.*, *supra*, 307 U.S. at 507. In the instant case, on the other hand, there is no claim for damages, and no alternative basis for establishing a monetary value to the claim in the required amount. Indeed, although they initially alleged that $10,000 was involved, appellants now concede that they cannot justifiably make such a claim and simply maintain that it is unnecessary for them to be able to do so for jurisdiction to exist.

2. Appellants in effect contend that the jurisdictional amount limitation is unconstitutional as applied to any case challenging the action of a federal official, at least where a constitutional claim is asserted. In such a case, they say, the New York courts will refuse to take jurisdiction, and, accordingly, to bar federal jurisdiction would be to deny all possibility of judicial relief. However, the question of whether or in what circumstances a State court may review the actions of federal administrative officials is by no means clear. On the one hand, the New York Court of Appeals has held that it will not "control the manner in which a federal agency performs * * * its functions and duties under * * * federal statute where the Federal government has exclusive jurisdiction." *Matter of Schmoll, Inc.* v. *Federal Reserve Bank*, 286

N.Y. 503, 509, 37 N.E. 2d 225, 226, certiorari denied, 315 U.S. 818. But the court of appeals has also stated that it will "uphold the power of a State court 'acting within the field of its allotted jurisdiction, to enforce rights created by federal statute and to remedy wrongs committed by federal officers under color of authority granted by federal statutes.'" *Wasservogel* v. *Meyerowitz*, 300 N.Y. 125, 133, 89 N.E. 2d 712, 716, quoting from *Matter of Schmoll, Inc.* v. *Federal Reserve Bank*, *supra*. The decisions of this Court and other courts on the point are not clear. See Hart and Wechsler, *The Federal Courts and the Federal System*, 388-391. The lack of a remedy in the State courts should be clearer if it is to be invoked as a basis for holding a long-established statutory limitation on federal jurisdiction to be unconstitutional.[3]

Moreover, as we point out below in discussing Section 10(b)(3) of the Military Selective Service Act, Congress may, as a general matter, constitutionally limit a registrant's judicial remedies to post-induction proceedings. Accordingly, if this is also the effect of the jurisdictional amount limitation in 28 U.S.C. 1331, that statute is not thereby rendered unconstitutional.

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[3] Moreover, even if the State courts are not available, this does not mean that appellants are wholly without an avenue to have their claim considered judicially. If they have standing to make the claim at all, it would appear that it could be raised in a habeas corpus action brought after induction or in defense to a criminal prosecution for failure to submit to induction (see *infra*, p. 7).

3. For the reasons set forth in our brief filed in *Oestereich* v. *Selective Service System Local Board No. 11*, No. 46, this Term, and in our Jurisdictional Statement in *Clark* v. *Gabriel*, No. 572, this Term, we believe Section 10(b)(3) of the Military Selective Service Act constitutes a valid bar to judicial review before induction of administrative action classifying or processing a Selective Service registrant.[4] After induction the registrant may obtain judicial review in a habeas corpus action or in defense to a criminal prosecution for failure to submit to induction. Requiring the registrant to wait until that time is justified by the need to prevent "litigious interruptions" in the induction process (113 Cong. Rec. S8052 (June 12, 1967) (Sen. Russell)).

Some question may be raised about the intended application of Section 10(b)(3) in a situation like the present one. Appellants did not seek to challenge the propriety of their I-A classifications as such, but rather the constitutionality of the II-S deferments granted to college students under Section 6(h)(1) which, they asserted, were unavailable to them, as a practical matter, because of their financial circumstances. As a result, they contended, the likelihood of their induction was enhanced and the time thereof accelerated. Appellants' claim thus did not involve

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[4] As pointed out by the court below (J.S. App. 4a), Section 10(b)(3), as amended in 1967, simply confirmed and made explicit the rule which had previously been evolved in decisions of this Court and various courts of appeals, the substance of which was that Selective Service classifications were not judicially reviewable prior to a registrant's induction. *E.g.*, *Witmer* v. *United States*, 348 U.S. 375, 377.

the typical challenge to a local board's action which seeks to question the grounds on which a particular classification is determined. On the other hand, entertaining appellants' action—and similar challenges to various provisions of the Act—would entail the same sort of delays in the induction process as the more typical pre-induction suits which Congress had specifically in mind in enacting Section 10(b)(3). Indeed, two of the appellants here have received stays of induction pending disposition of this appeal, and if the same treatment is to be accorded to every registrant with a I-A classification who makes such a claim, this would seriously impair the effective functioning of the Selective Service System, and might even render it inoperable while the matter was *pendente lite*. Thus, the congressional purpose to prevent "litigious interruptions" would seem to be even more directly involved when the suit does not depend on the particular facts of the plaintiff's own situation, but rather raises points that implicate many other registrants similarly subject to induction.

It may well be, as the dissenting judge below pointed out, that a I-A classification represents a "contingent liability of a very painful sort" (J.S. App. 10a), and, absent countervailing considerations, this might well be a judicially cognizable injury. But Congress has determined that the need to prevent "litigious interruptions" in the induction process ordinarily requires postponement of judicial relief until after induction. The "contingent liability" to which appellants are subject is no greater than the liability of any registrant with a I-A classification,

and thus appellants can make no claim for special treatment. Nor is there merit to the suggestion by the dissenting judge (J.S. App. 12a) that after induction appellants will lose their standing to challenge the constitutionality of the II-S deferments given to others. If a registrant ever has standing to challenge the constitutionality of deferments given other registrants (see *Talmanson* v. *United States*, 386 F. 2d 811, 812 (C.A. 1)), he would have standing no less after than before induction, since the granting of deferments to others would affect the order in which a registrant without a deferment is called for induction, and thus the propriety of his induction at the time it occurred.

4. At all events, although the district court dismissed appellants' action "for lack of a justiciable controversy and for want of jurisdiction" (J.S. App. 7a), it appears clear that their underlying claim is lacking in substantial merit. In essence, their contention is that Congress could not constitutionally determine that the national interest is served by postponing the military training and service of those draft-eligible individuals who are "satisfactorily pursuing a full-time course of instruction at a college, university, or similar institution of learning and who request such deferment" (50 U.S.C. App. (Supp. III) 456(h)(1)). Appellants maintain that the very existence of deferments for college students works a discrimination against those without funds to attend college, and that Section 6(h)(1) is thus invalid on its face. But it is a contemporary commonplace that those otherwise qualified to attend college have

available to them a large array of scholarships, loans and other forms of financial assistance, from government and private sources. Moreover, the purpose underlying the Military Selective Service Act is to establish "a system of selection which is [not only] fair and just," but one "which is [at the same time] consistent with the maintenance of an effective national economy" (50 U.S.C. App. 451(c)). Section 6(h)(1) is plainly related to the achievement of that objective, for it simply seeks to allow those interested in doing so to complete their college education before being required to perform military service. Under that section, those granted II-S deferments are ineligible for certain other exemptions and deferments upon completion of college, and "upon the termination of such deferred status or deferment, and if qualified, [are] liable for induction as a registrant within the prime age group irrespective of his actual age" (50 U.S.C. App. (Supp. III) 456(h)(1)). In addition, a II-S deferment in any event expires when the registrant reaches the age of 24, although still enrolled in college.

In short, Congress has determined that it is in the national interest to encourage persons to obtain a college degree before being required to serve in the Armed Forces, should they choose to do so. It has also made a variety of educational benefits available to those serving in the Armed Forces and particularly to those who have completed their military service. Section 6(h)(1) is a reasonable part of this overall pattern, and appellants' constitutional challenge is thus without substance. Accordingly, the judgment

below dismissing their complaint was correct, regardless of the propriety of the jurisdictional grounds on which the district court relied. That judgment might therefore be affirmed on this ground, without reaching those questions. See, *e.g.*, *Rabinowitz* v. *Kennedy*, 376 U.S. 605, 607.

## CONCLUSION

For the reasons stated, the judgment below should be affirmed, or, alternatively, the appeal dismissed.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

OCTOBER 1968.

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SUPREME COURT OF THE UNITED STATES

October Term 1968

No. 490

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JOHN F. DAVIS, CLERK

JAMES BOYD, BERNARD HUGHES, CECIL RALPH HENDRIX, and CHARTER TAYLOR, Jr.,

Plaintiffs-Appellants

v.

RAMSEY CLARK, as Attorney General of the United States, LEWIS B. HERSHEY, as Director of Selective Service of the United States, PAUL AKST, as Director of Selective Service of the City of New York, SELECTIVE SERVICE BOARD No. 44 of the City of New York, and SELECTIVE SERVICE BOARD No. 2 of the City of New York,

Defendants-Appellees.

On Appeal
From The United States District Court
For The Southern District of New York

# PETITION FOR REHEARING

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February 4, 1968

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 490

JAMES BOYD, BERNARD HUGHES, CECIL RALPH HENDRIX, and CHARTER TAYLOR, JR.,

Plaintiffs-Appellants

v.

RAMSEY CLARK, as Attorney General of the United States, LEWIS B. HERSHEY, as Director of Selective Service of the United States, PAUL AKST, as Director of Selective Service of the City of New York, SELECTIVE SERVICE BOARD No. 44 of the City of New York, and SELECTIVE SERVICE BOARD No. 2 of the City of New York,

Defendants-Appellees.

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On Appeal
From The United States District Court
For the Southern District of New York

## PETITION FOR REHEARING

Plaintiffs hereby petition this Court for a rehearing of its decision dated

January 13, 1969, affirming, without argument, the decision of a three-judge statutory court sitting in the Southern District of New York dismissing the complaint herein. This Court is respectfully requested to note probable jurisdiction of the appeal from that decision.

On December 17, 1968, subsequent to the filing of a jurisdictional statement in this case, this Court decided Clark v. Gabriel, ___ U.S.___, 89 Sup. Ct. 424, 37 U.S.L.Week 3217, and Oestereich v. Selective Service System Board No. 11, ___ U.S.___, 89 Sup.Ct. 414, 37 U.S.L.Week 4053. The former decision was cited by this Court in affirming the decision of the court below in the instant case.

In Oestereich, Gabriel and this case, plaintiffs sought a pre-induction injunction and all three involve the application

of §10(b)(3) of the Military Selective Service Act, 50 U.S.C. App. §460(b)(3). In the Gabriel case, the Court held §10(b)(3) applicable when the registrant sought judicial review of the validity of his classification, claiming that it had no basis in fact. In Oestereich, this Court held §10(b)(3) to be inapplicable when the registrant claimed that he was entitled to a statutory exemption from the draft. In its opinion in the latter case, this Court stated that in such situations "there is no exercise of discretion by a Board in evaluating evidence and determining whether a claimed exemption is deserved" (89 S.Ct. at 416).

The instant case is easily distinguishable from Gabriel; indeed, if Oestereich was correctly decided, then a fortiori, §10(b)(3) is not applicable to this case. Here, plaintiffs allege that the student deferment

provisions of the Military Training and Service Act of 1967 and the regulations enacted thereunder were unconstitutional (a) in that they discriminated against persons such as themselves who were economically unable to attend college and (b) that the classification of registrants into two groups - students and non-students - was an arbitrary and discriminatory classification bearing no reasonable relationship to the purposes of the Act.

In appointing a three-judge court, the District Court found that the constitutional question was a substantial one. The statutory court denied relief without reaching the constitutional issue, holding that §10(b)(3) applied and that the jurisdictional amount required under 28 U.S.C. 1331 was

not established.

The instant case provides even stronger grounds for relief than Oestereich and better reasons for holding §10(b)(3) inapplicable. The issue here is a constitutional one; that in Oestereich was statutory. Even more important, plaintiffs here do not challenge their classification at all. Cf. Harlan, J. concurring in Oestereich, 89 S.Ct. at 417. They are complaining rather that the Act exempts from its operation over a million registrants on grounds which are discriminatory and in violation of the Fifth Amendment, and that they are injured by such discrimination. There is no possible appeal within the Selective Service for these plaintiffs because there is no ruling of the Board from which they can appeal, i.e., given the

terms of the Act, their classification was proper. Oestereich at least had some remedy from the action of his Local Board, namely, the possibility of an administrative appeal within the Selective Service System; here there is none. Both cases are characterized by the fact that there is no exercise of discretion by the Board to determine whether a claimed exemption is appropriate, but in this case the Board has no power at all to correct the wrong done to plaintiffs by re-classifying them.

With all due respect to the decision of this Court, this case bears little resemblance to Gabriel, in which there was an issue concerning the proper classification of the registrant and a fact-finding function which the Board could perform.

The result of this Court's affirmance in this case is to compel plaintiffs to violate the law, with its severe criminal sanctions, to secure consideration of their constitutional claims which heretofore have never been considered either by a court or any administrative agency. Ex Parte Young, 209 U.S. 123.

## CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement, it is respectfully urged that a rehearing be granted and that upon such rehearing probable jurisdiction be noted.

Respectfully submitted,

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Of Counsel

February 4, 1969

## CERTIFICATE OF COUNSEL

This is to certify that the Petition for Rehearing is presented in good faith and not for the purpose of delay.

Victor Rabinowitz

# SUPREME COURT OF THE UNITED STATES

October Term, 1968.

BOYD ET AL. *v.* CLARK, ATTORNEY GENERAL, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 490. Decided January 13, 1969.

PER CURIAM.

The judgment is affirmed, *Clark* v. *Gabriel*, 392 U. S. ——, without reaching the jurisdictional question raised under 28 U. S. C. § 1331.